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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/725,248

12/01/2003

Sharon Ann Norton

P145

1932

27752

7590

06/02/2008

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EXAMINER

CLARK, AMY LYNN

ART UNIT

PAPER NUMBER

1655

MAIL DATE

DELIVERY MODE

06/02/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/725,248	Applicant(s) NORTON ET AL.	
	Examiner Amy L. Clark	Art Unit 1655	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 05 December 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-53 is/are pending in the application.
- 4a) Of the above claim(s) 13 and 24-53 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-12 and 14-23 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

In view of the Request to Reopen Prosecution filed on 12/05/2007,
PROSECUTION IS HEREBY REOPENED. A new ground of rejection is set forth
below.

To avoid abandonment of the application, Applicant must exercise one of the
following two options:

(1) file a reply under 37 CFR 1.111 (if this Office action is non-final) or a reply
under 37 CFR 1.113 (if this Office action is final); or,

(2) initiate a new appeal by filing a notice of appeal under 37 CFR 41.31 followed
by an appeal brief under 37 CFR 41.37. The previously paid notice of appeal fee and
appeal brief fee can be applied to the new appeal. If, however, the appeal fees set forth
in 37 CFR 41.20 have been increased since they were previously paid, then Applicant
must pay the difference between the increased fees and the amount previously paid.

A Supervisory Patent Examiner (SPE) has approved of reopening prosecution by
signing below:

/Terry A. McKelvey/

Supervisory Patent Examiner, Art Unit 1655

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-53 are currently pending.

The claims have been examined, insofar, as they read on the elected invention, namely beet pulp. This application contains claims drawn to an invention nonelected with traverse under "Response to Election / Restriction Filed", which was received on 13 December 2005. A complete reply to the final rejection must include cancellation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.01.

Currently, Claims 1-12 and 14-23 are under examination.

Response to Arguments

Claim Rejections - 35 USC § 102

Claims 1-5 and 14-17 remain rejected under 35 U.S.C. 102(a) as being anticipated over Suzuki et al. (A*), as evidenced by <http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=1861689414> (U*).

This rejection is maintained for reasons of record set forth in the paper mailed on 5 October 2007 and repeated below, slightly altered to take into consideration Applicant's arguments filed on 5 December 2007.

Applicant claims a composition comprising at least about 0.25% of total fermentable fiber, consisting of beet pulp, by weight of the composition, wherein the

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composition is a liquid, which is adapted for use by a companion animal. Applicant further claims a composition comprising at least about 0.5% of total fermentable fiber, by weight of the composition. Applicant further claims the composition comprising one or more nutrients. Applicant further claims the composition comprising from about 0.1%-20% of total fermentable fiber.

Suzuki teaches an agent for preventing, inhibiting or treating hypertension, comprising two distinct components, which by definition is a composition (See abstract). Suzuki further teaches these components are a compound selected from the group consisting of caffeic acid, chlorogenic acid and ferulic acid, and esters and pharmaceutically acceptable salts thereof and a component selected from the group consisting of central nervous system stimulating components, food fibers, extracts of perennial evergreen leaves, etc (See abstract). Suzuki further teaches that the food fibers in the composition include beet fibers obtained from beet pulp (See paragraph 0026) in a proportion of 0.001 to 1% (See paragraph 0025). Suzuki further teaches that when food fiber is used, the composition is in the form of a drink or a food (See paragraph 0029) and that when the food fiber is used, it is contained in a proportion of 0.1-20% (See paragraph 0030). Suzuki further teaches the drink comprising of the composition contains 82.1-83.6% water (paragraph 0085 and "Table 11"), which is suitable for drinking (please note that drinking water is defined as water intended for people to drink, as taught by

<http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=186168>

9414), since Suzuki further teaches that the drink containing the composition and 82.1-83.6% water were given to humans (See paragraph 0087).

Therefore, the reference anticipates the claimed subject matter.

Applicants argue Suzuki does not disclose a composition for use in a companion animal because, according to Applicant, “*preferably*, ‘companion animal’ means a domestic dog, cat, rabbit, ferret, horse, cow, *or the like*” (emphasis added by the Examiner). Applicants further argue that extending the definition to include humans would be inconsistent with the specification. Applicants further argue that the current application provides an explicit definition of “companion animal” and that the written description provides that a consumer includes “companion animal guardian, breeder, veterinarian or the like” and that the specification also provides that the term “orally administering” with respect to the companion animal means that the animal ingests or a human is directed to feed, or does feed, the animal one or more compositions herein.

However, this is not found persuasive because with the analysis that Applicants’ use of the phrase “or the like” does extend the definition to include humans, and therefore, Applicants’ composition for companion animals is merely an intended use, does not create a structural difference between the claimed composition and the cited composition, and thus is not limiting. It should be noted that the phrase “Adapted for use by a companion animal” in its broadest reasonable interpretation simply means that the composition is in a form that can be used for the companion animal. Even if “companion animal” does not encompass humans, a composition that can be used by

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humans can also be consumed by animals such as dogs or cats unless the composition contains an ingredient in sufficient quantity which should not be consumed by animals. That is the case here since the ingredients of the composition taught by Suzuki can be consumed by non-human animals. Furthermore, it should be noted that Applicants leave the definition of "companion animal" open by further disclosing "or the like". First of all, humans do fall under the category of "companion animal" for the reasons set forth below previously and below because human beings are "companion animals", since humans are defined as mammals, which is synonymous with animal, and companion is defined as "a person who accompanies or associates with another" (See <http://dictionary.reference.com/search?q=companion&r=66>, reference V*). Secondly, humans fall under the category of "domestic animal" since the biological definition of "animal" refers to all members of the Kingdom *Animalia* and, therefore, when the word "animal" is used in a biological context, humans are included. Humans are also considered to be "domestic", which by definition means of or pertaining to the home, the household or the family, devoted to home life, of or pertaining to one's own or particular country as apart from other countries or indigenous to a country.

In response to Applicants' arguments with respect to guidance on who may administer the composition and how it is to be administered, please note that Applicants disclose "companion animal guardian". Some humans do have guardians (guardians can be in the form of a nurse or a parent or someone assigned to care for someone who is incapable of taking care of his or herself, either due to age or incapacitation). Furthermore, Applicants, again, use the term "or the like" to describe who may

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administer the composition and, again, this may be extended to anyone who may care for a person. Finally, with regards to oral administration, Applicants disclose that guidance for administration may be "be oral direction (e.g., through oral instruction from, for example, a veterinarian *or other health professional*), radio or television media (i.e., advertisement), or written direction (e.g., through written direction from, for example, a veterinarian *or other health professional* (e.g., scripts)..." (See page 12, lines 1-5) (emphasis added by the Examiner). "Other health professional" can encompass a doctor or a nurse for a human patient. "Written direction" can refer to a prescription that is provided to a human for another human. For example, in the case of a child, parents generally administer medication or supplements to a child, since children, are not aware of dosage requirements and would not be able to measure the amounts themselves. Therefore, a child would require a guardian to administer a composition to him or her.

Applicants further argue that under 35 U.S.C. § 102, anticipation requires that all the Claim elements appear in a prior art document. "A Claim is anticipated only if each and every clement set forth in the claim is found, either expressly or inherently described, in a single prior art reference." MPEP § 2131 citing *VerdegalBros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2D 1051, 1053 (Fed. Cir. 1987). "The Identical invention must be shown in as complete detail as is contained in the ... Claim." MPEP § 2131 citing *Richardson v. Suzuki Motor Co.*, 868 P.2d1226, 1236, 9 USPQ2D 1913, 1920 (Fed. Cir. 1989).

However this is not found persuasive because in response to Applicants' arguments set forth above, a recitation of the intended use of the claimed invention

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must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

Applicants are further directed to MPEP § 2106 (C), which states:

“The subject matter of a properly construed claim is defined by the terms that limit its scope. It is this subject matter that must be examined. As a general matter, the grammar and intended meaning of terms used in a claim will dictate whether the language limits the claim scope. Language that suggests or makes optional but does not require steps to be performed or does not limit a claim to a particular structure does not limit the scope of a claim or claim limitation. The following are examples of language that may raise a question as to the limiting effect of the language in a claim:

- (A) statements of intended use or field of use,
- (B) “adapted to” or “adapted for” clauses,
- (C) “wherein” clauses, or
- (D) “whereby” clauses.

This list of examples is not intended to be exhaustive. See also MPEP § 2111.04.”

Therefore, the intended use of the claimed composition does not patentably distinguish the composition, *per se*, since such undisclosed use is inherent in the reference composition. In order to be limiting, the intended use must create a structural difference between the claimed composition and the prior art composition. In the instant case, the intended use does not create a structural difference, thus the intended use is not limiting.

"[T]he discovery of a previously unappreciated property of a prior art composition, or of a scientific explanation for the prior art's functioning, does not render the old composition patentably new to the discoverer." *Atlas Powder Co. v. Ireco Inc.*, 190 F.3d 1342, 1347, 51 USPQ2d 1943, 1947 (Fed. Cir. 1999). Thus the claiming of a new use, new function or unknown property which is inherently present in the prior art does not necessarily make the claim patentable. *In re Best*, 562 F.2d 1252, 1254, 195 USPQ 430, 433 (CCPA 1977).

Therefore, the reference anticipates the claimed subject matter and the rejection is maintained.

Claims 1, 2, 4-12, 14, 15 and 18-23 remain rejected under 35 U.S.C. 102(a) as being anticipated over Cheuk et al. (B*).

This rejection is maintained for reasons of record set forth in the paper mailed on 5 October 2007 and repeated below, slightly altered to take into consideration Applicant's arguments filed on 5 December 2007.

Applicants claim a composition comprising at least about 0.25% of total fermentable fiber, consisting of beet pulp, by weight of the composition, wherein the composition is a liquid, which is further claimed as gravy, which is adapted for use by a companion animal. Applicants further claim a composition comprising at least about 0.5% of total fermentable fiber, by weight of the composition. Applicants further claim the composition further comprising at least about 0.5% protein and at least about 1% fat, by weight of the composition. Applicants further claim the composition comprising

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one or more nutrients. Applicants further claim a composition comprising from about 0.1% to about 20% of total fermentable fiber.

Cheuk teaches a canine pet food composition comprising meat, which Cheuk teaches contains 15-25% protein (See paragraph 0037) and 5-15% fat (See paragraph 0037), beet pulp (which inherently contains insoluble fiber), in an amount of about 8 wt%-16 wt% (See paragraph 0047), and vitamins and minerals (See paragraph 0040) in the form of a chunk and gravy composition (See paragraph 0051 and Claim 4). Cheuk further teaches a method of making a canine pet food composition comprising a first step, wherein the meat components are "thermally set" at and/or below temperatures of protein denaturation of the mixture and heated essentially by themselves, that is, with the essential or total absence of grains, additional water, vitamins, minerals, and the like and that the heating process generally improves the texture of the meats by inactivating the bacterial and tissue enzyme processes, it is believed, thereby providing a final pet food composition which is friable, that is, breaks under stress and that the temperature treatment is such that a slight coagulation of the protein occurs which contributes to the moisturized appearance of the protein in the final product (See paragraph 0022).

Cheuk further teaches that the next step involves treating grains, which may be beet pulp (See paragraph 0040), separately and then adding them to the previously "thermally set" meat, wherein the grains are mixed and cooked at a temperature range which will achieve or essentially achieve hydration, gelatinization, and retrogradation so as to improve their binding to the meats and/or reduce the stickiness or increase the firmness of the finished product texture and additionally, complex carbohydrate is

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broken down to simpler carbohydrate. Cheuk further teaches that an elevated temperature is needed to accomplish these properties, wherein this step is carried out at a temperature of up to 180-200 °F but desirably not exceeding 180-185 °F can be employed (See paragraph 0023). Cheuk further teaches that various gravy components, wherein the gravy that ensues (please note that gravy is a thickened sauce, which may be gelatinous) with meat that has been heated to a temperature at or below the denaturation point of the meat portion (please note that gravy can be further defined to include juices and extractives of meat during cooking to form a thickened sauce) are made by heating such as native starches, water and the like to prepare a viscosity building slurry or fluid and that the purpose of such preparation is to increase the cohesiveness of the two components (a) and (b) so as to maintain an essentially or totally homogenous mass during the filling process into the container (See paragraph 0024 and Claim 4). Cheuk further teaches that the components are heated with water to about 180-200 °F to provide a viscosity buildup slurry or fluid so as to maintain an essentially or totally homogeneous mass during the filling process while post retorting (after filling) these material(s) will retrograde to deliver the desired characteristics such as friable texture in the final packaged canine diet when opened for consumption (See paragraph 0029).

Cheuk does not expressly teach a composition comprising from about 0.1% to about 20% of total fermentable fiber, however Cheuk teaches an amount of fermentable fiber which falls within the range claimed by Applicant, therefore, Cheuk anticipates the claimed subject matter.

Therefore, the reference anticipates the claimed subject matter.

Applicants argue that Cheuk is directed to: "[a] canine pet food composition comprising a meat based material having an essentially solid mass assuming the shape of the container in which it is packed, said pet food having meat particles with moisturized appearance and visually recognizable discrete food particles upon slicing the pet food mass after departure from the solid container". Applicants further argues that Cheuk specifically discloses a "meat based material having an essentially *solid* mass assuming the shape of the container in which it is packed,.. " and that the composition has "... visually recognizable discrete meat particles with a moisturized appearance upon slicing the pet food mass after departure from the said container." See Column 1, paragraph [0003]. Applicants further argue that, therefore, Cheuk clearly does not teach a liquid composition, the composition of Cheuk is a solid composition and Cheuk does not teach, suggest or disclose a liquid composition containing fiber.

In response to Applicants' argument, it should be noted that Applicants are claiming a composition comprising at least about 0.25% of total fermentable fiber, consisting of beet pulp, by weight of the composition, wherein the composition is a liquid which is adapted for use by a companion animal. Please note that the claim explicitly states that the liquid of the composition may be adapted (please note that adapted means "changed in order to improve or made more fit for a particular purpose" and "to make suitable to or fit for a specific use or situation") for use by a companion animal.

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Given the broadest reasonable interpretation of "adapted for use by a companion animal, Cheuk does in fact teach Applicants' claimed invention, since Cheuk teaches a canine pet food composition that is originally in liquid form that solidifies when cooled to provide a pet food composition in a form that is more easily and readily useable by a companion animal.

Therefore, the composition taught by Cheuk is a liquid "adapted for use by a companion animal" and the reference anticipates the claimed subject matter.

The rejection of claims 1, 2, 6-9, 14, 15 and 18-21 under 35 U.S.C. 102(b) as being anticipated by Farang et al. (C*), in view of <http://en.wikipedia.org/wiki/Food> (W*), http://web.archive.org/web/*/http://www.peteducation.com/article.cfm?cls=1&cat=1399&articleid=2705 (X*) and <http://dictionary.reference.com/search?q=companion&r=66> (V*) has been withdrawn because although the Examiner agrees with Appellants' argument that under § 102, anticipation requires that all the claim elements appear in a prior art document. "A Claim is anticipated only if each and every element .set forth in the Claim is found, either expressly or inherently described, in a single prior art reference." MPEP § 2131 citing *Verdegal Bros. v. Union Oil Co. of California*, 814 F.2d 628,631, 2 USPQ2D 1051, 1053 (Fed. Cir. 1987). "The Identical invention must be shown in as complete detail a is contained in the ... Claim." MPUP § 2131 citing *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2D 1913, 1920 (Fed. Cir. 1989), and that the present invention requires in Claim 1 a composition comprising at least about 0.25% of total fermentable fiber, by weight of the composition, wherein the composition

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is a liquid which is adapted for use by a companion animal. However, upon further consideration, a new grounds of rejection is made with regards to the rejection of claims 1, 2, 6-9, 14, 15 and 18-21 under 35 U.S.C. 103(a) as being unpatentable over Farang et al. (C*), in view of <http://en.wikipedia.org/wiki/Food> (W*),

http://web.archive.org/web/*/http://www.peteducation.com/article.cfm?cls=1&cat=1399&articleid=2705 (X*) and <http://dictionary.reference.com/search?q=companion&r=66> (V*)

because the Examiner does not find the rest of the arguments with regards to the teachings of Farang to be persuasive. Please note that this new grounds of rejection was presented in the "Examiner's Answer to Appeal Brief" filed on 10/05/2007.

Therefore, the Examiner is maintaining this rejection upon taking into consideration Applicants' arguments presented in Applicants response to the "Examiner's Answer to Appeal Brief", wherein Applicants' arguments were filed on 5 December 2007. The maintained rejection and response to Applicants' arguments are presented below.

Claim Rejections - 35 USC § 103

Claims 1, 2, 6-9, 14, 15 and 18-21 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Farang et al. (C*), in view of <http://en.wikipedia.org/wiki/Food> (W*),

http://web.archive.org/web/*/http://www.peteducation.com/article.cfm?cls=1&cat=1399&articleid=2705 (X*) and <http://dictionary.reference.com/search?q=companion&r=66> (V*).

Applicants claim a composition comprising at least about 0.25% of total fermentable fiber, consisting of beet pulp, by weight of the composition, wherein the

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composition is a liquid, which is further claimed as a gravy, which is adapted for use by a companion animal. Applicants further claim a composition comprising at least about 0.5% of total fermentable fiber, by weight of the composition. Applicants further claim the composition comprising one or more nutrients.

Farang teaches a stable, bland, free flowing food supplement (please note that food is defined as any substance that can be consumed, including liquid drinks and that food is the main source of energy and nutrition for animals, as taught by

<http://en.wikipedia.org/wiki/Food>) comprising sugar beet pulp, which has a chemical composition of about 4-8% by weight water, 7-9% crude protein, which reads on a nutrient, about 15-25% crude fiber (please note that the fiber in beet pulp is insoluble and moderately fermentable, as taught by

http://web.archive.org/web/*/http://www.peteducation.com/article.cfm?cls=1&cat=1399&articleid=2705, on page 1, paragraph 3, found in the section entitled, "The benefits of beet pulp"), which anticipates the range claimed by Applicant, about 60-70% nitrogen-free extracts and about 2.5-5% ash (See column 4, claim 9). Farang further teaches that the food supplement is usable in gravies, soups, sauces, dips and batters, as well as in imitation fruit drinks (See column 1, lines 54-62 and column 3, lines 38-49).

Farang further teaches a composition comprising at least 0.25% fermentable fiber.

Please note that human beings are "companion animals", since humans are defined as mammals, which is synonymous with animal, and companion is defined as "a person who accompanies or associates with another" (See

<http://dictionary.reference.com/search?q=companion&r=66>).

Farang does not teach that the composition is in the form of a liquid. However, at the time the invention was made, it would have been obvious to one of ordinary skill in the art and one would have been motivated and had a reasonable expectation of success to modify the form of the composition taught by Farang to provide the instantly claimed invention because at the time the invention was made, it was known in the art that the composition taught by Farang could be used in gravies, soups, sauces, dips and batters as well as in imitation fruit drinks (please note that gravies, soups, sauces, dips, batters and drinks are all liquid compositions), as clearly taught by Farang.

Based upon the beneficial teachings of the cited references, the skill of one of ordinary skill in the art, and absent evidence to the contrary, there would have been a reasonable expectation of success to result in the claimed invention.

Accordingly, the claimed invention was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, especially in the absence of evidence to the contrary.

Applicants argue that Farang never teaches or suggests a liquid composition comprising at least about 0.25% of total fermentable fiber. Applicants further argue that Farang specifically teaches that the composition is dry and quickly swells in hot or cold aqueous systems, thereby creating a filling and thickening material. See Column 1, lines 54-62.

In response to Applicants' arguments, please note that Farang teaches a food supplement that may be used in gravies, soups, sauces, dips and batters, as well as in

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imitation fruit drinks. Therefore, although Farang does not expressly teach a composition in liquid form, it would have been obvious to make the food supplement into a liquid composition because the food supplement taught by Farang was known to be used to make liquid compositions, such as in gravies, soups, sauces, dips, batters, and imitation fruit drinks.

Applicants further argue that additionally, Farang does not teach or suggest that the composition is adapted for use by a companion animal. Applicants further argue that although the Examiner attempts to include humans in the definition of companion animal provided in the present specification, humans are not included in the Applicants' definition of companion animal as presented in the specification; therefore, the present invention cannot be anticipated by this reference because Farang et al. does not disclose each and every element of the present application, it cannot as a matter of law anticipate the present application.

Please note that Applicants define "companion animal" as domestic animal and Applicant provides a few examples of possible "companion animals", such as domestic dog, cat, rabbit, ferret, horse, cow, or the like. Please note that Applicant leaves the definition open by further disclosing "or the like". First of all, humans do fall under the category of "companion animal" for the reasons set forth above, secondly, humans fall under the category of "domestic animal" since the biological definition of "animal" refers to all members of the Kingdom *Animalia* and, therefore, when the word "animal" is used in a biological context, humans are included. Humans are also considered to be "domestic", which by definition means of or pertaining to the home, the household or the

family, devoted to home life, of or pertaining to one's own or particular country as apart from other countries or indigenous to a country.

Furthermore, it should be noted that Applicants are citing an intended use of a composition. It should be noted that the intended use of the claimed composition does not patentably distinguish the composition, *per se*, since such undisclosed use is inherent in the reference composition. In order to be limiting, the intended use must create a structural difference between the claimed composition and the prior art composition. In the instant case, the intended use does not create a structural difference, thus the intended use is not limiting.

"[T]he discovery of a previously unappreciated property of a prior art composition, or of a scientific explanation for the prior art's functioning, does not render the old composition patentably new to the discoverer." *Atlas Powder Co. v. Ireco Inc.*, 190 F.3d 1342, 1347, 51 USPQ2d 1943, 1947 (Fed. Cir. 1999). Thus the claiming of a new use, new function or unknown property which is inherently present in the prior art does not necessarily make the claim patentable. *In re Best*, 562 F.2d 1252, 1254, 195 USPQ 430, 433 (CCPA 1977). See also MPEP § 2112.01 with regard to inherency and product-by-process claims.

Finally, the phrase "Adapted for use by a companion animal" in its broadest reasonable interpretation simply means that the composition is in a form that can be used for the companion animal. Even if "companion animal" does not encompass humans, a composition that can be used by humans can also be consumed by animals such as dogs or cats unless the composition contains an ingredient in sufficient quantity

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which should not be consumed by animals. That is the case here since the ingredients of the composition taught by Farang can be consumed by non-human animals.

Therefore, the reference anticipates the claimed subject matter and the rejection is maintained.

No claims are allowed.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Amy L. Clark whose telephone number is (571)272-1310. The examiner can normally be reached on Monday to Friday between 8:30am - 5pm.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on (571) 272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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